IN THE SUPREME COURT OF MISSISSIPPI
NO. 2011-TS-00016

IN THE MATTER OF THE EXTENSION OF THE BOUNDARIES OF THE CITY OF TUPELO, MISSISSIPPI

LEE COUNTY, MISSISSIPPI, CITY OF SALTILLO, MISSISSIPPI, THE BELDEN FIRE PROTECTION DISTRICT, THE PALMETTO-OLD UNION FIRE PROTECTION DISTRICT, AND THE UNITY FIRE PROTECTION DISTRICT **APPELLANTS**

V.

CITY OF TUPELO, MISSISSIPPI **APPELLEE**

Appeal from the Chancery Court of Lee County, Mississippi
Cause No. 08-1446-41

REPLY BRIEF OF APPELLANT LEE COUNTY, MISSISSIPPI

Oral Argument Requested

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to *Mississippi Rule of Appellate Procedure* 34, Lee County, Mississippi, respectfully requests oral argument in this appeal. The Appellants in this matter have raised significant errors and mistakes of law which were committed by the trial court below, and this Court's ruling has the potential of changing the landscape of municipal annexation law, as well as the standards governing the admission of expert witness testimony. Lee County respectfully submits that mistakes were made in this matter that require reversal of the Lee County Chancery Court's decision finding reasonable the City of Tupelo's proposed annexation, as modified.

Specifically, as set forth in Lee County's Principal Brief, this Court is faced with the following significant errors and legal issues on appeal: (1) whether the *Daubert* standard for admissibility of expert witness testimony has any application in the chancery court – under the lower court's ruling, it does not; (2) the failure of the City of Tupelo to demonstrate a commitment to providing annexed residents and property owners something of value in return for their tax dollars; (3) the Lee County Chancery Court's violation of *Mississippi Rule of Evidence* 611 in improperly limiting the cross-examination of an expert witness; (4) significant jurisdictional defects as a result of the failure of the City of Tupelo to provide adequate notice to annexed citizens; (5) the failure of the Lee County Chancery Court to consider the inequitable and unreasonable impact of Tupelo's annexation into the Lee County Fire Protection Districts; and (6) the manifestly erroneous approval of an annexation that was not supported by substantial and credible evidence.

The proceedings in the lower court involved a trial which lasted some twenty-two (22) days over the course of nearly three (3) months, with a record which consists of over 3,700 pages of trial testimony and a court record exceeding 1,400 pages. It is respectfully submitted that oral

argument will be a benefit to this Court in considering the fact intensive issues presented on this appeal.

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A. ISSUE: DOES THE *DAUBERT* STANDARD FOR ADMISSIBILITY OF EXPERT WITNESS TESTIMONY APPLY IN BENCH TRIALS?

Let there be no question: Either *Daubert*[1] applies in bench trials, or *Daubert* does not apply in bench trials. If *Daubert* does apply in bench trials, then the lower court in this case committed reversible error by failing to allow a *Daubert* examination of Tupelo's expert witness, Karen Fernandez. Thus, if *Daubert* does apply in bench trials, the lower court's decision in this case must be reversed. On the other hand, if this Court determines that *Daubert* is not applicable in bench trials, then the lower court did not commit error by refusing to allow a *Daubert* challenge of Tupelo's expert, and Tupelo wins on this particular issue.

As set forth in Lee County's Principal Brief, in admitting Ms. Fernandez as an expert witness in this matter, the Lee County Chancery Court ruled as follows:

> The Court is of the opinion at this point **that urban and regional planning is a legitimate field of professional expertise and that it qualifies under the Daubert standards.**
>
> Now, the issue is, **is she a qualified expert. The Court is not going to allow you to go through all of her testimony and find that out . . .**

Chancellor Prisock, Tr. 2669-70 (emphasis added). This ruling, however, reflects an abandonment of the "gatekeeping" role which this Court vested with the trial courts in adopting the *Daubert* standard for determining admissibility of expert witness testimony in this State. *See Mississippi Transportation Commission v. McLemore*, 863 So. 2d 31, 39 (Miss. 2003). Specifically, this Court has stated that "whether testimony is based upon professional studies or personal experience, the 'gatekeeper' must be certain that **the expert** exercises the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 37-38 (emphasis added). In admitting the testimony of Ms. Fernandez, the lower court failed to first determine whether Ms. Fernandez was qualified to testify in the proffered field of expertise (i.e.,

[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993)

exercised the same level of intellectual rigor that characterizes the practice of an expert in her field), consistent with the mandates of *Daubert* and *Mississippi Rule of Evidence* 702.

This Court, however, has specifically recognized the application of *Daubert* in matters being tried without a jury. For example, in *Giannaris v. Giannaris*, 960 So. 2d 462, 469-71 (Miss. 2007), this Court reversed the decision of a chancery court (bench trial) where the court had abandoned its gatekeeping role and admitted testimony which lacked sufficient reliability under *Mississippi Rule of Evidence* 702 and *Daubert*. Similarly, in *S.G. v. D.C.*, 13 So. 3d 269, 274 n. 5 (Miss. 2009), this Court noted that the standards of *Daubert* applied to the testimony of a guardian ad litem in chancery court (bench trial).

The standard for admitting expert witness testimony initially established by the United States Supreme Court in *Daubert*, and later modified in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), is the standard governing its admission in this State. *McLemore*, 863 So. 2d at 39. As such, lower courts are vested with a "gatekeeping" responsibility, pursuant to which a lower court must ensure that expert testimony admitted is both relevant and reliable. *Hubbard ex. rel. Hubbard v. McDonald's Corp.*, 41 So. 3d 670, 675 (Miss. 2010). This "gatekeeping" responsibility is not limited solely to jury trials, nor has this Court adopted a policy of allowing unreliable or unqualified expert witness testimony to be admitted at bench trials. Rather, this Court has stated that "because of the weight that is given to expert testimony, it is imperative that trial judges remain steadfast in their role as gatekeepers under the *Daubert* standard." *Watts v. Radiator Specialty*, 990 So. 2d 143 (Miss. 2008). There is no restriction or limited application of the *Daubert* and *McLemore* standard to just jury trials in the State of Mississippi, despite Tupelo's argument that such a limited application exists.

The Lee County Chancery Court failed to remain steadfast to its role as gatekeeper under the *Daubert* standard. In doing so, the Court admitted the testimony of Ms. Fernandez as an

expert in the field of urban and regional planning without first determining "whether she [was] a qualified expert." Tr. 2669-70. Lee County submits that the admission of expert testimony without first determining that a witness is qualified to testify violates the principles underlying *Daubert* and *Miss. R. Evid.* 702, and is an abuse of discretion which warrants reversal.

B. THE CITY OF TUPELO FAILED TO DEMONSTRATE A COMMITMENT TO PROVIDE ANNEXED RESIDENTS AND PROPERTY OWNERS SOMETHING OF VALUE IN RETURN FOR THEIR TAX DOLLARS.

Tupelo completely misconstrues the position of Lee County on this critical appellate issue. The County does NOT contend, as Tupelo suggests, that a municipality must provide the lower court with final engineering plans and specifications prior to the approval of its annexation. Rather, it is the County's position (consistent with prior Mississippi Supreme Court case law on this very issue) that where the governing authorities of a municipality completely fail to demonstrate any commitment to funding or otherwise providing the municipal services and improvements proposed by its department heads and/or urban planning witness, the City cannot carry its burden of demonstrating that annexed residents will receive something of value in return for their tax dollars. As stated by this Court in other municipal annexation cases, mere department head and planner recommendations as to services proposed for annexed areas do not amount to a commitment by the City to provide such services. *See, In re the Enlargement and Extension of the Mun. Boundaries of the City of Jackson*, 691 So. 2d 978, 983-84 (Miss. 1997).

This Court has clearly stated that in order to carry the burden of showing reasonableness, a municipality must "demonstrate through plans or otherwise, that residents of annexed areas **WILL** receive something of value in return for their tax dollars." *In re the Extension of the Boundaries of the City of Columbus*, 644 So. 2d 1168, 1171 (Miss. 1994) (emphasis added). Significantly, this Court did not hold that a municipality must demonstrate that residents and property owners "may" (or may not) receive something of value in return for their tax dollars. In

the proceedings below, however, the service and improvement proposals reflected in Tupelo's "preliminary" Services and Facilities Plan was just that: a conceptual model created by Tupelo's department heads and its planner as to services and improvements the annexed areas MAY receive in return for their tax dollars. The Tupelo City Council did not authorize or otherwise commit to fund any of the services or improvements proposed by its department heads or planner. See, e.g., Pitts, Tr. 2548.

The City of Tupelo's "plan" for services and improvements presented to the Lee County Chancery Court is the very type plan which this Court criticized in *City of Jackson*, stating:

> Furthermore, it should be noted **that the proposal for improvements and extension of services presented to the Court by the City was merely the product of department head and planner recommendations, and the City Council had not approved any of the improvements the witnesses for the City testified that the City indented to make in the proposed annexation area.**

691 So. 2d at 983-84 (emphasis added). Despite the City of Tupelo's inferences otherwise, the fact that Jackson failed to approve the services plan of its department heads and planner was a critical factor in this Court's reversal of Jackson's proposed annexation. Likewise, it should be a critical factor in this Court's reversal of Tupelo's proposed annexation.

Municipalities may only speak through their minutes. *See, e.g., Tupelo Redevelopment Agency v. Abernathy*, 913 So. 2d 278 (Miss. 2005). As this settled concept relates to proposed services and improvements to be delivered to annexed residents and property owners in return for their tax dollars, these services and improvements plans are meaningful only if the municipality formally commits to providing them. *See, e.g., City of Jackson*, 691 So. 2d at 983-84. Otherwise, the "plans" are mere conceptual proposals by department heads and planners, with no guarantee that the City will fund the proposals following annexation. To this end, it is undisputed that the Tupelo City Council did not adopt or otherwise commit to fund the proposed plan. Pitts, Tr. 2548.

Simply put, while a preliminary "Services and Facilities Plan" was admitted at the trial of this matter, there was absolutely no commitment by the City to fund or otherwise approve the "plan." As such, there was no plan or commitment by the City to provide residents and property owners annexed anything in return for their tax dollars. Rather, all that was before the court below was a conceptual model of services and improvements which MAY (or may not) be provided to residents and property owners annexed. As this Court has held in two prior municipal annexation cases, such a lack of an adopted plan does not rise to the level of demonstrating that residents and property owners annexed "**WILL** receive something of value in return for their tax dollars," as required in order to carry the burden of demonstrating the reasonableness of an annexation. *City of Jackson*, 691 So. 2d at 983-84; *City of Columbus*, 644 So. 2d at 1171 (emphasis added).

C. THE LEE COUNTY CHANCERY COURT VIOLATED *MISSISSIPPI RULE OF EVIDENCE* 611 AND COMMITTED REVERSIBLE ERROR IN IMPROPERLY LIMITING THE CROSS-EXAMINATION OF TUPELO'S EXPERT WITNESS.

This Court has held that the impact a municipality's proposed annexation would have on the voting strength of protected minority groups should be given considerable weight when the issue is raised by persons with standing (i.e., minorities). *See, City of Columbus*, 644 So. 2d at 1180. In the proceedings below, a number of minority voters, as well as a minority member of the Lee County Board of Supervisors, raised concerns at trial and in discovery over the potential dilution of the voting strength of minorities as a result of annexation. *See, e.g.,* Wheeler, Tr. 1193; Goree, Tr. 1238; Deposition of Tommie Lee Ivy, pp. 21-22, January 6, 2009 (Exhibit T-131). As such, this issue was to be given considerable weight.

The lower court, however, on the objection of Tupelo, improperly limited the cross-examination of the only witness testifying on this issue, Tupelo witness Karen Fernandez. Tupelo describes the objection which resulted in Lee County having to cross-examine Ms.

Fernandez on a proffer as follows: "When Lee County's attorney began its **cross-examination of Karen Fernandez, Tupelo's urban and regional planning expert**, on this *indicium*, counsel for Tupelo raised an **objection to the line of questioning on the basis that Lee County had not disclosed any opinion of its expert on this indicium.**" Tupelo Brief in Response to Lee County, p. 12 (emphasis added). In other words, Tupelo objected to the cross-examination of its expert witness (who had testified on this specific issue on direct examination) on the basis that a completely different expert witness had not formed an opinion on this issue. This "objection" and position are utterly nonsensical. Limiting cross-examination on this basis violates the policy of "wide-open cross examination" and the lower court abused its discretion in not overruling Tupelo's objection. *See, e.g., Miss. R. Evid.* 611(b); *Miss. R. Evid.* 611 *cmt.*; *State Highway Commission of Mississippi v. Harvard*, 508 So. 2d 1099, 1102 (Miss. 1987).

Tupelo contends that this issue was waived when Tupelo failed to obtain a ruling on its objection to the cross-examination of Ms. Fernandez on the issue of minority voting strength impact. However, this is not the case. The City raised the objection, Lee County cross-examined Ms. Fernandez on a proffer, and the parties thereafter submitted detailed trial briefings on the City's objection. Tr. 578-681; Tr. 3102-07. Following the filing of trial briefs on this issue, the trial court indicated that it would reserve ruling on Tupelo's objection. Tr. 3270-71. As a result, Lee County's cross-examination remained a PROFFER, subject to the lower court overruling Tupelo's objection and considering the testimony in its final opinion. A review of the Chancellor's opinion, however, demonstrates that Lee County's cross-examination of Ms. Fernandez was simply not considered.

For example, the Chancellor's two-sentence ruling on this issue (an issue which was to be given significant consideration as it had been raised by minorities with standing) found that the "evidence demonstrated that the dilution of minority voting strength as a result of annexation

will be *de minimis*." However, this disregards the evidence and proffered cross-examination testimony of Ms. Fernandez regarding significant demographic changes in Tupelo since the year 2000 (the demographic baseline used by Tupelo to estimate the current impact on voting strength of protected minority groups). T-92; T-100; Tr. 3128, 3141. Tupelo's own evidence demonstrated that between 2000 and 2007, there was a 62% increase in the total African-American population, as well as a 3% decrease in the total white population, neither of which were factored in to Ms. Fernandez's calculations regarding the present impact on the voting strength of protected minority groups. Ms. Fernandez further testified during the proffered cross-examination that she "couldn't give a definitive answer" as to whether the PAA had experienced similar demographic changes over the same time frame. Tr. 3141. Obviously, Tupelo cannot establish that its annexation would only result in a *de minimis* dilution in the voting strength of protected minority groups when the City did not take into account the current demographic makeup of the existing city and "couldn't give a definitive answer" as to the current demographic makeup of the PAA. But this critical cross-examination was on PROFFER only and was not considered by the trial court, which is exactly why the lower court committed reversible error in excluding such cross-examination in violation of *Miss. R. Evid.* 611.

This Court has stated that "the latitude allowed counsel in cross-examination in this state is quite wide," and that "any matter relevant may be probed." *Havard*, 508 So. 2d at 1102. Here the Chancellor failed to overrule an objection by the City to the cross-examination of its expert witness on one of the *indicia* of reasonableness (without a doubt, a relevant matter in this proceeding). The Chancellor abused his discretion in doing so and his decision must be reversed.

D. THE LEE COUNTY CHANCERY COURT DID NOT HAVE JURISDICTION OVER TUPELO'S ANNEXATION PETITION.

In its Response, Tupelo attempts to distort this jurisdictional error by misstating Lee County's position to be that where a trial on the merits is not commenced on the date and time

which was posted and published by the annexing municipality, the Court loses jurisdiction.[2] This, however, is not the position of the Lee County. Rather, Lee County's position is simply this: the lower court's indefinite recess of the initial hearing on Tupelo's Annexation Petition (where nothing more than procedural matters were addressed – i.e., discovery deadlines, dispositive motion deadlines, etc.) without setting a date and time certain for future proceedings on the proposed annexation, denies persons interested in, affected by, or aggrieved by the proposed annexation of their statutory and due process right to notice of when and where they are to appear and voice their objection to the City's annexation.

The operational reality of today's annexation proceedings is that, more often than not, trial on an annexation petition is not held on the date set for hearing pursuant to *Miss. Code Ann.* § 21-1-31. As such, persons interested in, affected by, or aggrieved by a city's proposed annexation (i.e., residents and property owners of areas being annexed) generally become mere spectators at the lawyer-driven initial hearing, during the course of which the court sets certain procedural and discovery-related deadlines, but does not hear testimony from any witnesses or objectors. Nevertheless, *Miss. Code Ann.* §§ 21-1-15 and 21-1-31 guarantee these affected residents and property owners the right to notice of when and where to voice their objections to the proposed annexation. This statutory right is only protected upon strict compliance with the notice provisions of *Miss. Code Ann.* §§ 21-1-15 and 21-1-31 of when and where to appear and present their objections.

[2] Tupelo's position does raise an interesting point of law. *Mississippi Code Ann.* § 21-1-27, *et seq.* governs municipal annexation proceedings in this State and provides specifically that notice of the hearing on a municipal annexation petition be provided pursuant to *Mississippi Code Ann.* § 21-1-15, a statute which governs notice in municipal incorporation proceedings. However, unlike the municipal incorporation statutes, and more specifically *Mississippi Code Ann.* § 21-1-17 which specifically provides that the "chancellor shall have the power . . . to grant such reasonable continuances [from the date posted and published] as justice may require," the municipal annexation statutes do not contain any specific authorization for the chancellor to continue the proceedings from the date and time initially fixed for hearing.

Mississippi Code Ann. § 21-1-31 establishes the notice requirements in annexation matters and provides that notice of the date certain fixed for hearing on the petition "shall be given in the same manner and for the same length of time as is provided in section 21-1-15 . . . and all parties interested in, affected by, or being aggrieved by said proposed enlargement or contraction **shall have the right to appear at such hearing and present their objection to such proposed enlargement or contraction.**" To this end, *Mississippi Code Ann.* § 21-1-15 requires notice to be given both by publication in "some newspaper published or having general circulation in the territory proposed to be [annexed]" as well as by posting "a copy of such notice in three or more public places in such territory."

This Court has held that "the issue of notice in annexation cases has been specifically classified as jurisdictional," and that "the requirements relative to notice as provided in Section 21-1-15 are mandatory and jurisdictional and in the absence of proper notice, the trial court [is] without jurisdiction . . . ." *In re the Enlargement and Extension of the Mun. Boundaries of the City of Clinton*, 920 So. 2d 452, 455 (Miss. 2006); *Norwood v. Extension of Boundaries of City of Itta Bena*, 788 So. 2d 747, 751 (Miss. 2001). This Court has further stated that "the notice required by [21-1-15] is in lieu of personal service and it is well settled that a statute providing for notice in lieu of personal service must be strictly complied with. . . ." *In re Extension of the Boundaries of the City of Pearl*, 365 So. 2d 952, 953 (Miss. 1978). It makes absolutely no difference whether there were "front page news" articles regarding the annexation trial, as Tupelo points out in its Response, or whether annexed residents may have received some other form of secondary notice of the annexation trial. The law requires strict compliance with *Mississippi Code Ann.* §§ 21-1-15 and 21-1-31 in order to ensure that residents and property owners annexed are afforded the right to object to a proposed annexation.

November 3, 2008, was the date on which the initial return hearing was held on Tupelo's Annexation Petition. It was not, however, the date on which residents and property owners were given the right to fully present their objections to Tupelo's proposed annexation. While Tupelo posted and published notice of the November 3, 2008 hearing pursuant to *Miss. Code Ann.* §§ 21-1-15 and 21-1-31, that hearing was recessed indefinitely without providing persons interested in, affected by, or aggrieved by the proposed annexation notice of a future date and time upon which they could appear and exercise their statutory right to object. In failing to provide such a future date and time certain, the lower court lost jurisdiction over Tupelo's Annexation Petition. Accordingly, this Court should reverse the lower court's decision based upon lack of jurisdiction.

E. THE CHANCELLOR ERRED IN FAILING TO CONSIDER THE INEQUITABLE AND UNREASONABLE IMPACT OF TUPELO'S ANNEXATION INTO THE LEE COUNTY FIRE PROTECTION DISTRICTS.

A critical issue before this Court on appeal relates to the City of Tupelo's proposal to annex into the statutorily-created Lee County Fire Protection Districts. Specifically, this Court must consider whether the Chancellor manifestly erred in approving as reasonable and equitable an annexation which results in the double-taxation of annexed residents and property owners; creates financial uncertainty as to the viability of the impacted Districts and their ability to continue service in areas not annexed into Tupelo; shifts the burden of addressing the impact on statutorily-created fire protection districts and double-taxed residents and property owners away from the annexing municipality; and ignores and violates the express statutory right of fire protection districts to remain the "sole public corporations" empowered to provide fire protection services within their legal boundaries. Lee County submits that the resultant impact of Tupelo's annexation into the Lee County Fire Protection Districts violates this Court's principle that "an annexation cannot be both inequitable and reasonable." *Western Line Consol. School Dist. v. City of Greenville*, 465 So. 2d 1057, 1059-60 (Miss. 1985).

This issue has been fully briefed by the Lee County Fire Districts (and was likewise briefed by Lee County in its Principal Brief), and Lee County hereby joins in the Districts' briefs filed in this matter pursuant to *Miss. R. App. P.* 28(i). Lee County does, however, take the opportunity to address Tupelo's assertions relative to standing to raise the issue of double-taxation on behalf of annexed citizens. This Court, in *Harrison County v. City of Gulfport*, 557 So. 2d 780, 783 (Miss. 1990), dispatched of the argument raised by Tupelo in this matter, holding: "the interest of the county is derived from the interest of the citizens of the county living in or owning property in the areas tabbed for annexation. The board of supervisors is the governmental authority closest to those people and is surely charged to protect their welfare. From these thoughts it is a short step to *Miss. Code Ann.* § 21-1-31 (1972), which describes those who may appear and object to an annexation. . . ."

There can be no doubt that Lee County, charged with protecting the "welfare" of "citizens living in or owning property in the areas tabbed for annexation," has standing to raise the issue of double-taxation of annexed citizens for fire protection services. Tupelo initiated these annexation proceedings, yet it failed (or refused) to address the inequitable impact its annexation would have upon annexed citizens and impacted fire protection districts by: (1) all residents and property owners annexed being subjected to double taxation, paying both the millage levied by the County to support the Fire Districts and the millage levied by the City to support its municipal fire services (despite Tupelo being legally precluded from providing such services pursuant to *Miss. Code Ann.* § 19-5-175); OR (2) financially devastating impacted Fire Protection Districts and forcing them to provide fire protection services to the remaining portions of their legal service areas not annexed by Tupelo on reduced funds and resources in the event that Tupelo follows through with its "plan" to provide fire protection irrespective of the Districts' exclusive rights (and the Districts are forced to stop levying taxes in support of their operation).

Neither result is equitable or reasonable, and the Lee County Chancery Court's approval of Tupelo's inherently inequitable annexation was in error and must be reversed.

F. THE LEE COUNTY CHANCERY COURT'S DECISION FINDING TUPELO'S ANNEXATION REASONABLE WAS MANIFESTLY ERRONEOUS AND NOT SUPPORTED BY SUBSTANTIAL AND CREDIBLE EVIDENCE.

In the proceedings below, the burden of proof was upon Tupelo to demonstrate that its proposed annexation was reasonable under the totality of the circumstances, considering the twelve *indicia* of reasonableness. *Miss. Code Ann.* § 21-1-33; *In re the Extension and Enlarging of the Boundaries of the City of Laurel*, 922 So. 2d 791, 796 (Miss. 2006). The weight of the evidence admitted at trial overwhelmingly demonstrated that Tupelo failed to meet its burden of proving the reasonableness of its proposed annexation. As set forth in Lee County's Principal Brief, the Chancellor's opinion disregarded substantial, credible evidence regarding certain *indicia* of reasonableness, and misapplied this Court's prior interpretation of other *indicia*.

Tupelo mischaracterizes Lee County's arguments relative to the *indicia* of reasonableness as being based solely on the City's recently-adopted "2025 Comprehensive Plan." However, while the City's 2025 Comprehensive Plan (notably, not mentioned once in the Chancellor's opinion) is certainly evidence of the City's lack of a need to expand and its internal path of growth, as well as a significant "other factor" weighing against this annexation, it is certainly not Lee County's "main basis for challenging Tupelo's annexation." Rather, Lee County challenges the reasonableness of Tupelo's annexation because the City failed to carry its burden of proof, and the Chancellor's opinion approving the City's annexation was manifest error and was not supported by substantial and credible evidence.

(1) *The City of Tupelo Failed to Demonstrate a Need to Expand.*

Tupelo failed to demonstrate that it had a need to expand its boundaries. More importantly, the Chancellor's determination as to Tupelo's need to expand disregarded the

weight of the substantial and credible evidence submitted at trial on each of the relevant factors set forth by this Court in *In re Extension of the Boundaries of City of Winona*, 879 So. 2d 966, 974 (Miss. 2004), and should be reversed.

Tupelo contends that the Chancellor's opinion was correct because Tupelo "need[s] a 'cushion' of vacant land." The substantial and credible evidence, however, clearly demonstrated that Tupelo currently has a "cushion" of just less than twenty (20) square miles of vacant and agricultural land within its existing city limits, which Tupelo City Planner Pat Falkner testified was "a lot of land." Falkner Tr. 607. *See City of Jackson*, 691 So. 2d at 981 (holding that the presence of a relatively high percentage of undeveloped land within an existing city should "be an impediment to annexation"). Moreover, Tupelo's argument fails to consider the reality of development trends within the existing City.

Tupelo does not dispute that the City is currently experiencing a sharp decline in new building permit issuance, and has been for the past several years. T-113, 115; Falkner, Tr. 463, 468-71. This factor is significant when considering Tupelo's argument that it needs a "cushion" of developable land (i.e., at current development rates, is the City in need of additional vacant land to accommodate anticipated growth and development?). The substantial and credible evidence admitted at trial demonstrated that, considering current development rates, Tupelo does not need any further "cushion" of vacant land beyond that which is currently present in the existing City. For example, between 1990-2009, Tupelo's land absorption rate (i.e., the rate at which vacant land was going into urban use) was approximately 134 acres per year. Fernandez, Tr. 2945-46; Watson, Tr. 3478-90; LC-49, 64. At this rate, Tupelo has a land supply which will last approximately 78 years. *Id.* This does not support any finding that Tupelo needs a further "cushion" of vacant land.

Tupelo argues that "increased traffic" likewise supports its need to expand, citing only to the fact that Tupelo has improved certain streets inside the City since its last annexation. The fact that Tupelo may have made certain street improvements certainly does not mean that traffic has increased. Moreover, the traffic count data submitted by the City (T-108) provides only the current annual average daily traffic count, with no baseline to determine if traffic volumes have increased or decreased. There is no evidence whatsoever to demonstrate that there has been any increased traffic counts which would demonstrate a need to expand.

Finally, Tupelo contends that the Chancellor's finding relative to its need to expand should be affirmed on the basis of Tupelo's population growth and/or internal growth. However, much of Tupelo's position in this regard centers on "expected" growth coming as a result of the Toyota Plant in the nearby municipality of Blue Springs, Mississippi, rather than actual growth which the City has experienced. With respect to Tupelo's actual internal growth and population growth, the substantial and credible evidence at trial demonstrated that neither supports a need to expand. Tupelo urges this Court to consider projected growth rather than actual historic growth, because the truth is that Tupelo's actual historic growth does not justify annexation.

For example, the evidence demonstrated that Tupelo's growth rate has declined substantially since its prior annexation in 1989.[3] Falkner, Tr. 486-87; T-123. In fact, between 2000 and 2007, Tupelo's population growth slowed to approximately 0.77% per year (down from 1.04% per year between 1990 and 2000), and its 2008 population growth was a mere 0.48%. T-123. Insignificant and/or declining levels of growth do not support a need to expand.

Simply put, Tupelo failed to demonstrate that it had a need to expand. Rather, the substantial and credible evidence demonstrated that the City has sufficient vacant land remaining

[3] Tupelo contends in its Response that it has experienced "a 51.57% increase in population since 1980." This percentage, however, is overstated as it relates to normal population growth given that the City of Tupelo nearly doubled in size in 1989 as a result of its last annexation.

inside its existing city limits; is experiencing a dramatic decline in building permit issuance; has experienced a decline in annual population growth in recent years; is not experiencing spillover growth into the PAA; and recently adopted a Comprehensive Plan which dictates that Tupelo focus on growth within the existing City. The Chancellor's opinion finding otherwise was in manifest error and must be reversed.

(2) The City of Tupelo's Path of Growth Is Inward (i.e., the Proposed Annexation Areas Are Not Within Tupelo's Path of Growth).

On this *indicium*, the Chancellor found that, with the exception of a portion of PAA 5, each of the Proposed Annexation Areas was within a path of growth of Tupelo. This finding was in error, given Tupelo's recently-adopted Comprehensive Plan; the fact that the land sought to be annexed is overwhelmingly agricultural and/or low-density residential development (and not spillover from the City); and the fact that Tupelo projects the PAA to remain largely agricultural and/or low-density residential uses well into the foreseeable future (i.e., the concept of a path of growth is premised upon growth, whereas here Tupelo projects limited to no change in the land use – limited or no growth - in the PAA for at least fifteen (15) years).

Tupelo urges this Court to affirm the Chancellor's findings based largely upon the adjacency of the PAA to Tupelo, as well as the existence of transportation corridors into the PAA. While Lee County certainly does not dispute that these factors exist, there is much more to a municipality's path of growth than a mere street leading into an area adjacent to the City (were this the case, there would be few areas that are not considered municipal paths of growth). For example, paths of growth are impacted by the policy decisions of the governing authorities of a municipality. Watson, Tr. 3511-14. In this matter, Tupelo's governing authorities, with input from current residents, recently adopted its "2025 Comprehensive Plan," which sets forth the stated public policy of the City to "focus development within the existing city boundaries," and utilize a "filling in of Tupelo that uses existing vacant land within the city in a more dense

development pattern." T-9, p.2. *See Miss. Code Ann.* § 17-1-1 (defining "comprehensive plan" as a "statement of public policy for the physical development of the entire municipality").

As Tupelo's Comprehensive Plan directly relates to the City's internal, deliberate path of growth, the City's Future Land Use Map, adopted as a part of the Comprehensive Plan, is critical as it demonstrates both "how [Tupelo] would want [the existing city and the PAA] developed" and "how [Tupelo] expects [the existing city and the PAA] to develop." Falkner, Tr. 530; T-9; LC-63. For purposes of determining Tupelo's **PATH** of growth, it is very significant that the City's adopted Future Land Use Map demonstrates that Tupelo does not expect urban development to occur within the PAA over the next 15 years. Watson, Tr. 3511-13. Rather, Tupelo projects growth to occur within the **EXISTING CITY**, with the PAA remaining exactly as it is today: agricultural land and/or low-density residential developments. Based upon Tupelo's adopted growth pattern as set forth in its recently-adopted Comprehensive Plan, Tupelo's Path of Growth is inward. However, the trial court utterly ignored the substantial and credible evidence on this *indicium*, and its finding on this factor was thus in error.

Tupelo further argues that it is experiencing spillover development into the PAA. However, this position ignores the testimony of Tupelo's expert witness that the overwhelming majority of the land sought to be annexed is not spillover development from Tupelo, but rather is undeveloped, agricultural, or right-of-way property. Fernandez, Tr. 2982-85, 2996-3009. Furthermore, with respect to other existing developments in the PAA, such as Indian Hills in PAA 2 North or developments in PAA 3, Ms. Fernandez testified that these are either "leapfrog developments" or have been around for many years, and are not considered "spillover." Fernandez, Tr. 2997-3000.

Ultimately, the Chancellor was manifestly wrong in finding that the PAA is within a path of growth of Tupelo. The City's Comprehensive Plan dictates that its path of growth is inward.

Moreover, the City's Future Land Use Map projects that the PAA will remain largely agricultural and/or low-density residential uses (i.e., that the PAA is not going to develop at urban levels). The Chancellor committed error in failing to consider this evidence.

(3) Potential Health Hazards.

Tupelo argues that the Chancellor should be affirmed on this *indicium* on the basis of soil conditions in the PAA, as well as the lack of available central sanitary sewer to many areas. However, it must be noted that Tupelo is seeking to annex overwhelmingly agricultural and low-density (i.e., large lot) residential parcels, and the reality is that the suitability of the soil in these type areas for septic tank usage is of little significance as it relates to a municipal annexation. For example, whether a soy bean field has soils which are not conducive to septic tank usage should have no bearing on the reasonableness of Tupelo's annexation. Moreover, soil conditions in PAA 6 are of little significance because Tupelo has no plans to deliver centralized sewer to the area.

Further, soil conditions inside the City mirror those that exist in the PAA, yet Tupelo has failed to extend sanitary sewer to at least 20-25 residents annexed over 21 years ago. *See Poole v. City of Pearl*, 908 So. 2d 728, 737 (Miss. 2005) (holding that "a municipality's track record for correcting and preventing health hazards within its city limits should certainly be a factor for a chancellor to consider in evaluating the potential health hazards of the PAA"); G. Reed, Tr. 1965, 1948; Fernandez, Tr. 3025. To this end, Tupelo admitted that it had identified only 4 septic tanks which were not functioning properly in the entire PAA. Fernandez, Tr. 3029.

Finally, Tupelo argues that because there are certain codes and ordinances in place in Tupelo which are not in place in unincorporated Lee County, the Chancellor was correct in his finding on this *indicium* (despite the fact that the Chancellor does not reference a single one of these codes or ordinances). However, the conditions which the City contends would be alleviated in the PAA through enforcement of Tupelo's codes and ordinances were shown at trial to

currently exist inside Tupelo. LC-51; Fernandez, Tr. 3039-41, 3046, 3056-57. Chris Watson testified that the conditions he observed in Tupelo were "as bad or worse" than the conditions photographed in the PAA. Watson, Tr. 3590. Moreover, Tupelo admitted that the conditions which it photographed and submitted to the trial court had largely been resolved by Lee County prior to trial. Fernandez, Tr. 2903-09, 3037, 3047, 3052.

Tupelo failed to carry its burden on this *indicium*. There is nothing in the record which would constitute convincing proof of any health hazard in the PAA which would have a bearing on the reasonableness of Tupelo's annexation. The lower court's finding otherwise was not supported by substantial and credible evidence and must be reversed.

(4) The City of Tupelo's Financial Ability.

On this *indicium*, the Chancellor found that Tupelo had the financial ability to undertake and pay for the proposed annexation. However, this finding is not supported by the substantial and credible evidence, which demonstrated that the City failed to contemplate the costs of services and capital improvements set forth in its Annexation Ordinance. As Tupelo failed to demonstrate the costs of services and improvements associated with its annexation, the Chancellor was without sufficient evidence to find that Tupelo had the financial ability to pay for such services and improvements.

Tupelo notes that much of the testimony regarding its "financial ability" was presented through Tupelo CFO, Lynn Norris. However, Mr. Norris admitted that he had "no idea" of the cost of delivering the services and improvements set forth in the City's Ordinance, including: (1) improving existing streets; (2) developing new streets as required by increased traffic demands; (3) making intersection improvements, improving water drainage, installing traffic control and safety devices; (4) developing and improving storm water drainage facilities; (5) constructing

and equipping additional public safety facilities; and (6) acquiring, upgrading, and interconnecting certified public water and sewer utility providers. Norris, Tr. 1446-1458.

Further, Tupelo alleges that it could fund the anticipated costs of services and improvements to the PAA without requiring any increase in ad valorem taxes or utility rates. There is no evidence in the record to support this assertion. For example, Tupelo admitted that no analysis was performed as to the impact of annexation on its existing utility rates. Norris, Tr. 1139, 1141; Hanna, Tr. 888, 906. Tupelo admitted that because existing customers outside the City pay a higher rate for water and sewer services than customers inside the City, the annexation would actually result in the City receiving less utility revenues. Hanna, Tr. 909.

Similarly, there is no evidence in the record regarding the impact which Tupelo's proposed annexation would have on its ad valorem tax rates. Tupelo is in its third consecutive year of substantial shortfalls of operating revenues compared to operating expenses, and its general fund balance is projected to fall below Tupelo's internal policy for minimum fund balance by the end of the current fiscal year (prior to paying a single cost associated with this $4,636,292 deficit annexation). Mayor Reed, Tr. 2442-44; Hanna, Tr. 969-79, 1001-02. Lynn Norris testified that if the City's operating deficit continues, Tupelo could exhaust its fund balance, and further that Tupelo can correct this downward spiral in only one of three ways: (1) borrowing money; (2) **raising taxes**; and/or (3) cutting services. Norris, Tr. 1124, 1130-32.

Ultimately, Tupelo failed to demonstrate that it has the financial ability to pay for services and improvements in the PAA, as the City failed to consider the costs associated with significant capital expenditures outlined in its Annexation Ordinance. The City likewise failed to demonstrate that its proposed water and sewer improvements would be economically feasible. Tupelo undisputedly does not know what its annexation will ultimately cost and, with no evidence in the record of the total cost of providing promised services and improvements to

residents in the annexed areas, the Chancellor was without substantial and credible evidence to find that Tupelo had the financial ability to pay for such services.

(5) The Need for Zoning and Overall Planning in the Annexation Area.

As is the case with the Chancellor's opinion on this *indicium*, Tupelo's Response simply outlines certain codes and ordinances which the City has in place which are not in place in Lee County. This alone, however, does not rise to the level of substantial and credible evidence necessary to carry the burden of proof under this *indicium* (i.e., that zoning and planning in the annexation area are **NEEDED**). The areas being annexed by Tupelo are largely agricultural lands and/or low-density residential developments. Tupelo both "expects" and "want[s]" the PAA to remain agricultural and/or low-density residential for the next 15 years. Falkner, Tr. 530; Watson, Tr. 3513-14; LC-63. To this end, Ms. Fernandez admitted that agricultural lands do not need services such as zoning and building inspections. Fernandez, Tr. 3005-06.

While Tupelo would like for this Court to distinguish the facts of this case from that of *In re the Enlargement of the Corporate Limits of the City of Hattiesburg*, 588 So.2d 814, 823-24 (Miss. 1991), the fact is that Tupelo, like Hattiesburg, failed to demonstrate that the current zoning and planning in the PAA are not adequate; failed to demonstrate that the PAA was likely to develop much more in the future (in fact, Tupelo projects that it will not); failed to demonstrate that the County's subdivision regulations are not adequate for current levels of development; and otherwise failed to demonstrate a need for additional zoning and planning in the area. The Chancellor's finding otherwise was manifest error.

(6) The Need for Municipal Services in the Annexation Area.

This Court has previously held that "[w]hen current services are adequate, the fact that annexation may enhance municipal services should not be given much relevance . . . ." *Poole*, 908 So. 2d at 740. In its Response, Tupelo outlines various municipal services which it proposes

to deliver to the PAA in connection with this proposed annexation. However, Tupelo failed to demonstrate that the current services in the area are not adequate, and, as such, did not meet its burden of proof on this *indicium*.

Karen Fernandez testified that in her analysis of Tupelo's annexation, she had identified no law enforcement deficiencies in the PAA. Fernandez, Tr. 3086. In fact, Tupelo Police Chief Anthony Carlton testified that the quality of services provided by the Lee County Sherriff's Office were "equal to" those provided by the Tupelo Police Department. Chief Carleton, Tr. 2218-19, 2220-21. Tupelo described the differences between the Tupelo Fire Department and the Lee County Fire Protection Districts, yet failed to demonstrate any inadequacies with respect to the present services of the Districts.[4] Further, the substantial and credible evidence established that the roads and streets of the PAA are being maintained by Lee County at an excellent level and are in need of no additional maintenance from Tupelo. Thompson, Tr. 3325-26; Russell, Tr. 2315, 2361; Mayor Reed. Tr. 2467-68. The City likewise failed to identify any parks and recreational needs within the PAA. Lewis, Tr. 2290-92.

The PAA is overwhelmingly "low density" and "not very developed." *See City of Winona*, 879 So. 2d at 984 (holding that sparsely populated areas have less of a need for municipal services). As Karen Fernandez testified, and as this Court has previously recognized, these type areas simply do not need city services. Fernandez, Tr. 3005-06. Accordingly, the Chancellor's conclusion that this factor supported Tupelo's proposed annexation was manifestly erroneous, and was not supported by substantial and credible evidence.

[4] Further, it must be noted with respect to fire protection services, *Miss. Code Ann.* § 19-5-175 prohibits Tupelo from providing first-response fire protection to areas annexed (all of which are situated within the boundaries of Fire Protection Districts created pursuant to *Miss. Code Ann.* § 19-5-151, *et seq.*).

(7) The City of Tupelo's Past Performance.

In its Response, the City of Tupelo contends that Lee County misportrayed evidence related to the City of Tupelo's past performance in the provision of fire protection services to its existing residents and property owners. This contention by Tupelo is wrong. It is undisputed that the Mississippi State Rating Bureau has been advising the City for eight (8) years that it needed to relocate Station No. 2 (a recommendation that the City has no plans of following); for eight (8) years that there is a water pressure issue in the Belden area annexed by Tupelo twenty-one (21) years ago; and for fifteen (15) years that it needed an additional ladder truck in order to provide adequate fire protection to the Barnes Crossing Mall. LC-60, 61; Walker, Tr. 2156, 2167-68. Tupelo's failure to follow these recommendations resulted in a letter from the Rating Bureau informing Tupelo's administration that the City had increased its deficiency points which put it in danger of losing its fire rating. Despite the Rating Bureau's admonitions to Tupelo's elected officials, it took the City's desire to annex additional territory to force it to spend necessary funds to meet the recommendations of the State Rating Bureau.

As was the case in this Court's *City of Jackson v. Byram Incorporators* decision, Tupelo "failed to present evidence regarding the provision of services to previously annexed areas. Instead, [Tupelo] presented evidence of municipal services it generally provides to all residents." 16 So. 3d 662, 689-90 (Miss. 2009). The Chancellor was in manifest error to find otherwise.

(8) There Will Be an Adverse Impact (Economic and Otherwise) of Tupelo's Proposed Annexation Upon Those Who Live In or Own Property in the Areas Proposed For Annexation.

Tupelo contends that "perfection is not required of an annexing municipality" and that, accordingly the adverse impacts demonstrated in Lee County's Principal Brief are of no importance. However, the substantial and credible evidence demonstrated that there would be an

adverse impact on annexed citizens as a result of Tupelo's proposed annexation, and this evidence established that this *indicium* weighed against Tupelo's proposed annexation.

For example, the substantial and credible evidence demonstrated that: (1) annexed residents and property owners would be subject to double taxation for fire protection services; (2) Tupelo had failed to make a commitment to funding or otherwise implementing the City's plan for services and improvements; (3) Tupelo proposed to deliver fire protection services to annexed territories in violation of the exclusive statutory legal rights of Lee County Fire Protection Districts to provide such services; and (4) the City may fund proposed water and sewer improvements through the issuance of general obligation debt, taxing all residents of the municipality for such utility services, regardless of whether or not they actually receive such services (see, for example, PAA 6 where the City proposes no water or sewer improvements).

The Chancellor's failure to consider the significant adverse impacts to residents and property owners annexed was manifest error. Tupelo failed to meet its burden of proof under this *indicium*, and the lower court's decision should be reversed.

(9) The Impact of the City of Tupelo's Annexation Upon the Voting Strength of Protected Minority Groups.

Tupelo contends that this issue was not raised by a person of minority race, then goes on to contradict this statement by pointing out that three (3) African-American individuals expressed concerns regarding the dilution of minority voting strength. The record clearly reflects that this issue was raised,[5] and the Chancellor committed manifest error in failing to give the "considerable weight" to this *indicium* that is required when it is raised by a person with standing. *City of Columbus*, 644 So. 2d at 1180.

Karen Fernandez, the only witness who testified regarding this *indicium*, admitted that there had been significant demographic changes in the City which were not considered in her

[5] Wheeler, Tr. 1193; Goree, Tr. 1238; Deposition of Tommie Lee Ivy, pp. 21-22, January 6, 2009 (Exhibit T-131).

calculations (including a 62% increase in the total African-American population in Tupelo and a 3% decrease in the total white population between 2000 and 2007). Ms. Fernandez acknowledged that she "couldn't give a definitive answer" as to whether the PAA had experienced similar demographic changes. Fernandez, Tr. 3128, 3141; T-92, T-100. Without any evidence in the record whatsoever as to the current demographics of the PAA, it was impossible for Tupelo to demonstrate that its proposed annexation would not improperly dilute the voting strength of protected minority groups. Accordingly, the Chancellor's finding on this indicium was not supported by substantial and credible evidence.

(10) Tupelo Failed to Demonstrate How Property Owners and Other Inhabitants of the Areas Sought to be Annexed Have in the Past, and for the Foreseeable Future Unless Annexed Will, Because of Their Reasonable Proximity to the Corporate Limits of the Municipality, Enjoy Benefits of Proximity to the Municipality Without Paying Their Fair Share of the Taxes.

On this *indicium*, the Chancellor found that "a number of benefits will accrue to residents of the PAA as a result of annexation." This is clearly not the question sought to be answered by this *indicium*, and the Chancellor's finding reflects a misapplication of this Court's prior interpretation of the "fair share" *indicium*, is unsupported by substantial and credible evidence, and must be reversed. Tupelo's Response fails to demonstrate how the Chancellor's finding on this *indicium* was anything other than legal error.

(11) Other Factors Which Suggest that Tupelo's Annexation is Not Reasonable.

The Chancellor's finding on this *indicium* was as follows: "Not Applicable." Significant factors, however, were raised by Lee County under this *indicium*, including: (1) Tupelo's configuration of the PAA in a manner which splits properties and roadways; (2) Tupelo's recently-adopted Comprehensive Plan and its direct conflict with this annexation; and (3) the lose-lose scenario created by Tupelo's failure to resolve the conflict with the Fire Protection

Districts. Tupelo simply cannot explain away in its Response the Chancellor's complete disregard of the substantial and credible evidence related to these significant issues.

G. CONCLUSION

This Court has held that it may reverse a chancellor's determination that an annexation is either reasonable or unreasonable "where the chancery court employed erroneous legal standards or **where we are left with a firm and definite conviction that a mistake has been made.**" *In re the Enlarging, Extending and Defining the Corp. Limits and Boundaries of the City of Horn Lake*, 57 So. 3d 1253, 1258 (Miss. 2011). Numerous mistakes were made by the lower court in its approval of Tupelo's annexation which require this Court's reversal, including: (1) failing to set the proceedings over for a date and time certain prior to recessing the initial return hearing, thereby denying all residents and property owners annexed of their statutory right to notice of when and where to appear and present objections to Tupelo's annexation; (2) approving Tupelo's annexation, despite the City's failure to demonstrate through plans or otherwise that residents of annexed areas will receive something of value in return for their tax dollars; (3) admitting expert witness testimony without first determining if the proffered expert was "qualified" to testify, in violation of *Daubert* and *Miss. R. Evid.* 702; (4) failing to consider the inequitable and unreasonable impact of Tupelo's proposal to annex into the legal boundaries of statutorily-created Fire Protection Districts; (5) improperly limiting the cross-examination of an expert witness in violation of *Miss. R. Evid.* 611; and (6) approving Tupelo's proposed annexation in the face of the City's clear failure to carry its burden of proof, and substantial and credible evidence which demonstrated that the City's annexation was unreasonable under the totality of the circumstances. Accordingly, it is respectfully submitted that this Court should reverse the determination of the lower court which approved, as modified, Tupelo's proposed annexation, and render a decision finding the City's proposed annexation unreasonable.

RESPECTFULLY SUBMITTED, this the 14th day of November, 2011.

BY: LEE COUNTY, MISSISSIPPI

BY: CARROLL WARREN & PARKER PLLC

BY: _____

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CERTIFICATE OF SERVICE

I, J. Chadwick Mask, counsel for Lee County, Mississippi, do hereby certify that I have this day mailed *via* United States First Class Mail, postage prepaid, or as otherwise indicated, a true and correct copy of the above and foregoing to the following:

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This the 14th day of November, 2011.

J. Chadwick Mask

CERTIFICATE OF SERVICE ON TRIAL JUDGE

I, J. Chadwick Mask, the undersigned counsel for Lee County, Mississippi, do hereby certify that this day a true and correct copy of the foregoing pleading has been delivered *via* United States Mail, postage prepaid to the trial judge in this matter at the following address:

The Honorable Edward C. Prisock
201 S. Jones Avenue
Louisville, Mississippi 39339

This, the 14th day of November, 2011.

J. Chadwick Mask